TESTIMONY BY

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BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE HOUSE JUDICIARY COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

REGARDING

POTENTIAL CONGRESSIONAL RESPONSES TO

***STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL*:**

CHECKING AND BALANCING PUNITIVE DAMAGES

on

SEPTEMBER 23, 2003

Mr. Chairman, I welcome your kind invitation to participate in this oversight hearing on "Potential Congressional Responses to *State Farm Mutual Automobile Insurance Co. v. Campbell*: Checking And Balancing Punitive Damages." You have shown wisdom and good judgment in holding this hearing.

Congressional action is needed to assure that fundamental due process rights, both substantive and procedural, are respected in order to protect citizens against unconstitutional punitive damage awards.

Let me begin with a brief background about punitive damages.

Background on Punitive Damages

Punitive damages began in England with a very legitimate purpose. They were used to help supplement the actions of state law enforcement to assure that wrongdoers were punished.[1] When punitive damages began to be utilized by some of our states, they were similar to the laws of England in their scope and purpose. They were confined to intentional wrongdoing, such as battery, assault, false imprisonment and trespass.[2] Their amounts were limited, rarely being greater than actual damages.[3]

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1 *See* Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763) (first case to use the term "exemplary damage,"); Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763); Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 1 (1982).

2 *See* Victor E. Schwartz et al*., Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1007-08 (1999).

3 *See* Southern Kan. Ry. v. Rice, 38 Kan. 898 (1888) ($35 costs and fees, $10 injury to feelings, $71.75 punitive); Woodman v. Town of Nottingham, 49 N.H. 387 (1870) ($578 actual, $100 exemplary). *See also* R. Blatt et al., *Punitive Damages: A State By State Guide To Law And Practice* § 1.2, at 5 (1991) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves"); Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 2 (1982) (For most of their history, punitive damages were "rarely assessed and likely to be small in amount.").

Punitive damages standards remained the same for more than two centuries. Beginning in the 1970s, however, they started to change.[4] Judges, not legislators, made these changes and because judges did so, they made their application retroactively.

First, the fundamental concept of intentional or purposeful wrongdoing was muted. Reckless or even gross negligence was deemed enough to punish.[5] This was a significant change, because the standards of gross negligence and recklessness are more amorphous than intentional, purposeful conduct.

Second, there was an increase in the number of cases in which punitive damages were sought and the types of conduct that might fall under their web.[6] Damages were assessed for failure to have a correct warning, a mistake in a surgical procedure, or a failure to have discovered a particular risk before a product was put on the market. These now come within the scope of punitive damage awards.

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4 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW & PRACTICE § 21.01, at 1 (1985).

5 *See, e.g.*, Rubeck v. Huffman, 374 N.E.2d 411, 413 (Ohio 1978) ("caused by intentional, reckless, wanton, willful and gross acts or by malice inferred from conduct and surrounding circumstances"); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (gross negligence and "reckless indifference to the consequences"). *See also* J. Sales & K. Cole, *Punitive Damages: A Relic That has Outlived Its Origins*, 37 Vill. L. Rev. 1117, 1130-38 (1984) (discussing standards of conduct giving rise to punitive damages award).

6 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW & PRACTICE § 21.01, at 1 (1985).

Third, the size of the awards increased astronomically. Prior to 1970, there was no punitive damage verdict of more than one million dollars. Today, multi-million or even multi-billion dollar verdicts shock no one.[7] This change caused the Supreme Court of the United States and its Members to "time and again"[8] express their concern about "punitive damages awards that run wild" in this country.[9]

Finally, punitive damages for the same conduct began to be assessed a multiplicity of times. In early common law, this was virtually impossible, as punitive damages were assessed against individuals for harm they caused to one person.[10] Once punitive damages were extended to product manufacturers or hospitals, or any entity that engaged in similar conduct with potentially multiple plaintiffs, the scepter of multiple punishment was possible and was often used. Decades ago, Henry Friendly, one of the most distinguished

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[7] This trend has led one commentator to suggest that "[p]unitive damages have replaced baseball as our national sport." Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, Wall St. J., Oct. 5, 1994, at A17. *See also* Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919, 919 (1989) ("Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case.").

[8] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 475 (1993) (Kennedy, J., concurring) (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 9-12, 18 (1991) and Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

[9] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

[10] *See* Victor E. Schwartz et al*., Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1007 (1999).

judges of the Twentieth Century warned against this,[11] but his warnings were ignored.

The Supreme Court Recognizes That Punitive Damage Awards May Trample on the Constitution

There have been many debates about punitive damages: Are they worthwhile? How should they be confined? The Supreme Court of the United States was not part of these debates. The Court only entered the fray when punitive damages trespassed on the Constitution. The Supreme Court has now visited the issue seven times, formulating rules for both procedural and substantive due process.[12] The Court has recognized that unrestricted punitive damages violate fundamental rights of our citizens. They can be destructive of property interests, cause economic chaos, including loss of jobs, and be palpably unfair.

While the Supreme Court decisions have been welcome, a brand-new phenomenon has occurred since their decisions were rendered. In some states, lower courts either have either not grasped the meaning of these

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[11] Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) ("The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

[12] State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am. v. Gore, 517 U.S. 559 (1996); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

decisions or have ignored them. Those lower courts include, among others, the Supreme Court of Utah,[13] the Court of Appeals of Oregon,[14] and the Supreme Court of Alabama.[15]

If this phenomenon had occurred with important Supreme Court decisions, such as *Brown v. Board of Education*,[16] *Miranda v. Arizona*,[17] *Roe v. Wade*,[18] and perhaps most on point, *New York Times v. Sullivan*,[19] the mainstream media would have been outraged. Until a recent *Wall Street Journal* editorial, which is appended to this testimony, the willful failure of some courts to follow Supreme Court guidelines have been ignored.[20]

Now, a number of state supreme courts have and will continue to assiduously follow the Supreme Court's constitutional guidelines that protect people from the imposition of excessive and unconstitutional punitive damage awards. For that reason, some have suggested that action by Congress is unnecessary. This perspective, however, misconstrues the impact that just a few

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13 *See* Campbell v. State Farm Auto. Mut. Ins. Co., 65 P.3d 1134 (Utah 2001), *rev'd* 123 S. Ct. 1513 (2003).

14 *See* Bocci v. Key Pharmaceuticals, Inc., 35 P.3d 1106 (Or. App. 2001), *vacated by* 123 S. Ct. 1781 (2003).

15 See BMW of N. Am. v. Gore, 646 So. 2d 619 (1994), *rev'd*, 517 U.S. 559 (1996).

16 347 U.S. 483 (1954).

17 384 U.S. 436 (1966).

18 410 U.S. 113 (1973).

19 376 U.S. 254 (1964).

20 The Sept. 10, 2003 editorial, *Punitive, Schmunitive,* also is available online at http://www.wsj.com (subscription only).

maverick courts can have when they do not follow Supreme Court guidelines on the Constitution.

Consider an example with some similarities that can be especially appreciated by the media. Almost forty years ago, the Supreme Court of the United States decided *New York Times v. Sullivan*, which provided protection under the First Amendment of the Constitution in a defamation case brought by a public official seeking to impose liability as well as punitive damages.[21] The Court held that the media could not be subject to a successful defamation action unless it was shown that it had engaged in actual malice. Fortunately, virtually every court in the United States followed the *New York Times* decision. What if some lower courts had decided not follow it, in the same way some courts have not followed the Supreme Court's mandate on punitive damages? The very policy concern of the Supreme Court in *New York Times* – a chilling effect on reporters writing about public figures – would still remain. This is because many newspapers and broadcast outlets are distributed throughout the United States. Many manufacturers, distributors and others operate in all fifty states. Unconstitutional punitive damage awards chill their benign actions. They could have a detrimental effect on jobs, costs, innovation and other activities that society wants. A few courts who do not follow these guidelines should not infringe upon the protections adhered to by a majority of courts.

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[21] 376 U.S. at 279-280. The Court extended its rule some time later to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

This phenomenon prompts the need for Congress to consider model constitutional guidelines for punitive damage awards in legislation. The case of *State Farm v. Campbell* makes the need for such legislation even greater, because the *State Farm* decision specifically spelled out outer constitutional limits on punitive damages. Unfortunately, already, at least one lower court, in a case in which we were directly involved, *Key Pharmaceuticals, Inc., v. Edwards*,[22] has ignored a portion of the *State Farm* decision – even though the Supreme Court of the United States had vacated a very large punitive damages award in that case under the auspices of *State Farm.*[23]

The American Legislative Exchange Council (ALEC) has adopted a Model Constitutional Guidelines for Punitive Damages Act, created for state legislation. The Act, which is appended to this testimony, could also serve as a model for federal legislation.[24]

ALEC's Model Constitutional Guidelines for Punitive Damages Act

The Model Act assures procedural due process in punitive damage cases. It is not intended to establish punitive damages in any state, or supplement tort reforms that may limit when punitive damages should be awarded, or the amount of those damages. Its purpose is to incorporate the

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22 123 S. Ct 1781 (2003).

23 On remand from the U.S. Supreme Court, the lower court allowed out-of-state lawful conduct to be considered as a basis to sustain the punitive damages award. Bocci v. Key Pharmaceuticals, Inc., 2003 WL 22097104 (Or. App. Sept. 10, 2003).

Supreme Court's decision in *Cooper Industries v. Leatherman Tool Group*,[25] which required appellate courts to provide a de novo review of the constitutionality of punitive damages. This means that lower courts cannot make discretionary, subjective and non-reviewable decisions about whether punitive damages award are constitutional. It is our understanding that in some jurisdictions, the *Leatherman* decision has been given lip service at best.

Perhaps of greater importance, ALEC's Model Act spells out fundamental, substantive due process guidelines for punitive damage awards. It makes clear what evidence a court may consider, as well as evidence that a court may not consider; for example, evidence of general wrongdoing on the part of a defendant. As the Supreme Court of the United States in *State Farm v. Campbell* made clear, "Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct...."[26]

We also suggest that the Congress consider legislation that directly addresses the problem of multiple imposition of punitive damages.

Congressional Action To Stop Multiple Imposition of Punitive Damages For The Same Conduct

There is only one civil justice tort reform agreed to by liberal, moderate and conservative judges: to place reasonable limits on multiple

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24 The Model Act is also available online at http://www.alec.org.

25 532 U.S. 425 (2001).

26 123 S. Ct. at 1523.

imposition of punitive damages for the same or similar conduct. Respected Senior Federal District Judge William Schwarzer of California has written: "Barring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs."[27] Judicial scholars realize that individual states cannot resolve the problem of multiple imposition of punitive damages. While some states, for example, Georgia, have successfully tried,[28] they can only prevent multiple imposition of punitive damages within their borders. All a

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[27] William Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW 116 (Oct. 1991). *See also* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 ("[T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labeled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment"), *vacated*, 718 F. Supp. 1233 (D. N.J. 1989), *rev'd on other grounds sub. nom.* Juzwin v. Asbestos Corp., 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990); In re N. Dist. Of Calif. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 889 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act"), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) ("we agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle"); In re Fed. Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting) (unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process"), *cert. denied*, 459 U.S. 988 (1982); Magallanes v. Superior Ct., 167 Cal. App. 3d 878, 888 (1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the first case is tried should be punished again when the second, or the tenth, or the hundredth case is tried."); King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1031 ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context."), *reh'g denied*, 914 F.2d 251 (5th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); McBride v. General Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct").

[28] Ga. Code Ann. 51-12-5.1(e)(1) (West 2003).

plaintiff lawyer need do is to shop for another forum that is still available, and hit a company again for the same wrongdoing.

Since a company may have injured many people, some have suggested that there would be nothing wrong with multiple hits, but there is. Multiple imposition of punitive damages for the same basic conduct has and will drive companies into bankruptcy before people receive their compensatory damages.[29] Moreover, a jury may not appreciate that the defendant has already been punished for the same basic wrong. Some have suggested that defense lawyers can control this by telling the jury that their client has already been punished. Anyone who understands basic trial tactics knows, however, that if a lawyer tells a jury during a trial that the defendant has not only been found liable, but has already been punished by another jury, the door would be closed on his or her defense. A defense lawyer is placed in a true dilemma: if he or she does not tell a jury about a prior award, the jurors would assume that they are the only ones to punish the defendant. If the lawyer tells the jury about a prior award, he or she has conceded the case.

Senator Hatch, Senator Lieberman, and others have worked in the past on the problem of multiple imposition of punitive damages. I have attached a copy of a bill on the subject that was developed by Senator Hatch in a prior

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[29] *See* Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [defendant's] liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence.")

session of Congress.[30] There has been scholarship on the issue, showing the extent of the danger of multiple imposition of punitive damages.

Conclusion

The Supreme Court of the United States has spoken loud and clear in *State Farm Mutual Automobile Insurance Co. v. Campbell* that substantive constitutional limits must be placed on punitive damages. There is a very real danger that these limits will be ignored or not understood by courts. That is why this oversight hearing is of particular importance, because this body can assure that basic, fundamental constitutional rights are protected with respect to outrageous punitive damage awards. No other body can do so. Consideration should be given to sound legislation to address this issue.

MODEL CONSTITUTIONAL GUIDELINES FOR PUNITIVE DAMAGES ACT

Summary

The Constitutional Guidelines for Punitive Damages Act is intended to help the courts of this state conform punitive damages awards to the requirements of the United States Constitution. The guidelines are based on the punitive damages jurisprudence of the United States Supreme Court. Because the laws governing punitive damages vary so much among the states, a legislator planning to introduce a punitive damages bill based on the Model Act should first consult his or her state's laws to determine which reforms embodied in the Model Act should be adopted, or adopted with modifications. These guidelines are supported by the Due Process Clause of the Fourteenth Amendment and the Supremacy Clause of the Constitution of the United States.

Model Legislation

{Title, enacting clause, etc.}

[30] Senate Bill No. 78 (105th Cong. (1997)) also is available online at http://www.thomas.gov.

Section 1. {Title.} This Act shall be known and may be cited as the Constitutional Guidelines for Punitive Damages Act.

Section 2. {Legislative Finding.} The legislature finds and declares that:

(A) the specter of unlimited punitive damages encourages needless litigation and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to victims;

(B) the public interest has been hampered unduly by the threat of unreasonable punitive damages awards, with the consumer paying the ultimate costs in higher prices and insurance costs;

(C) punitive damages are private punishments in the nature of fines awarded in civil cases;

(D) when warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking;

(E) the Supreme Court of the United States has established that there are constitutional procedural and substantive limitations on punitive damages awards;

(F) it is in the public interest to assure that all courts in the state review punitive damages awards in a manner consistent with the constitutional protections established by the Supreme Court of the United States; and

(G) it is in the public interest to establish guidelines for the review of the constitutionality of punitive damages in accordance with the jurisprudence of the Supreme Court of the United States.

Section 3. {Procedural Due Process Review Guidelines.}

(A) Appellate review of the constitutionality of a punitive damages award shall be available as a matter of right.

(B) On appeal, a reviewing court shall determine the excessiveness of a punitive damages award without according any weight or deference to the decision of the lower courts concerning the award's excessiveness.

Section 4. {Substantive Due Process Review Guidelines.}

(A) Generally. In determining whether a punitive damages award is grossly excessive so as to violate this Act, the following guideposts shall be considered:

(1) the reprehensibility of the defendant's misconduct that caused the plaintiff's harm;

(2) the ratio of the punitive damages award to the harm actually suffered by the plaintiff as a result of the defendant's punishable misconduct, as measured by the amount of compensatory damages; and

(3) the difference between the punitive damages awarded and the civil statutory or administrative penalties imposed in comparable cases.

(B) Reprehensibility. In determining the reprehensibility of the defendant's conduct under subsection (A)(1) of this Section, the following provisions apply:

(1) The court may consider:

(a) evidence of the wrongful acts of the defendant directly against the plaintiff;

(b) evidence of closely similar acts of wrongful conduct towards others, to the extent such evidence is probative of the defendant's state of mind.

(2) The court may not consider:

(a) evidence of acts of general wrongdoing on the part of a defendant;

(b) evidence of dissimilar acts of wrongful conduct of the defendant; or

(c) evidence of conduct of the defendant that was lawful in the jurisdiction where it occurred.

(3) A defendant may not be punished for acts of similar misconduct that affected only non-parties, or for acts that were lawful in the jurisdictions in which they occurred.

(C) Ratio. In considering the ratio between the plaintiff's harm and the punitive damages award under subsection (A)(2) of this Section, the following provisions apply:

(1) Punitive damages shall be proportionate to the compensatory damages awarded, but in no case, except as stated in subsection (2) below, shall the ratio of punitive to compensatory damages exceed 9 to 1.

(2) In cases where the compensatory damages award is less than $50,000, and for good cause shown, a larger ratio is permitted, but in no case shall the ratio of punitive to compensatory damages exceed 15 to 1.

(3) In cases where the compensatory damages award is $10 million or greater, the ratio of punitive to compensatory damages shall not exceed 1 to 1.

(D) Comparable Civil Penalties. In determining the comparable civil penalties for purposes of subsection A(3), the court shall consider only those statutory or administrative penalties that were in effect at the time of the plaintiff's misconduct and that actually have been imposed for acts comparable to the wrong done by the defendant to the plaintiff. The court shall not consider civil penalties for acts comparable to general wrongdoing by the defendant. The court shall not consider criminal penalties.

Section 5. {Severability Clause.}

Section 6. {Repealer Clause.}

Section 7. {Effective Date.} This Act shall be effective immediately upon its enactment. It shall apply to any review of the constitutionality of a punitive damages award pending or commenced on or after the date of enactment, regardless of whether the claim arose prior to the date of enactment.

SECTION BY SECTION ANALYSIS

The purpose of the Model Constitutional Guidelines for Punitive Damages is to assist state courts in conforming punitive damages awards to the requirements of the Constitution of the United States. As the United States Supreme Court has observed, punitive damages have "run wild" in this country. *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991). They have been arbitrary, erratic, and sometimes unfair in their application. Excessive punitive damage awards may not only be unfair to defendants. They can bankrupt defendants before injured persons receive compensatory damages.

In a series of cases, the United States Supreme Court has set forth a number of guideposts for courts to follow in determining whether a punitive damages award is so "grossly excessive" that it furthers no legitimate purpose and constitutes an arbitrary deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (limiting reprehensibility review to harms with a specific nexus to the individual plaintiff; ruling that single-digit ratio of punitive to compensatory awards applies in most cases; and barring the use of irrelevant out-of-state conduct to support a punitive award); *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring *de novo* appellate review of constitutionality of punitive damages awards); *BMW of N. America v. Gore*, 517 U.S. 559 (1996) (setting forth three guideposts for the analysis of the constitutionality of punitive awards under the Due Process Clause of the Fourteenth Amendment); *Honda Motor Company v. Oberg*, 512 U.S. 415 (1994) (emphasizing the common-law role of judicial review in assuring that punitive awards were not arbitrary or

excessive); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (emphasizing that substantive due process limits the amount of punitive awards); *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1 (1991) (ruling that punitive damages are subject to Due Process Clause of the Fourteenth Amendment).

Unfortunately, some state courts have had difficulty in construing and applying the United States Supreme Court's rulings in these cases. Some courts have not followed the rules, possibly because the rules were not brought to the attention of the court. The net result has been excessive appeals, unnecessary legal costs, and confusion in the law as to the proper application of constitutional principles. This Model Act seeks to clarify defendants' rights with respect to state punishment through the award and enforcement of punitive damages, and will assist in implementing fundamental constitutional principles in the future.

Section 1

This Section sets forth the title of the Act.

Section 2

This Section sets forth legislative findings regarding the need for the Act.

Section 3

This Section establishes that appellate review of the constitutionality of a punitive damages award is available as a matter of right, rather than at the discretion of the appeals court.

This Section also establishes that appellate review of the constitutionality of a punitive damages award shall be *de novo.* In other words, the appeals court shall give the issue a "thorough, independent review," *Cooper Industries Inc., v. Leatherman Tool*

Group, Inc., 532 U.S. 424, 436, 441 (2001). While giving deference to the trial court's factual findings, the appeals court shall not give any weight or deference to the decision of the lower courts when passing on the constitutionality of the punitive damages award. The United States Supreme Court has explained that *de novo* appellate review of the constitutionality of punitive damages awards is appropriate. "The question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). This helps assure that due process protections are enforced and that the law is appropriately developed and consistently applied.

This provision of the Model Act clarifies that the Supreme Court's requirement of *de* novo appellate review applies at both the federal and state levels, thus replacing the "abuse of discretion" standard of review available in some states. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, -- U.S. --, 123 S. Ct. 1513, 1521 (2003) ("*Cooper Industries* … mandated appellate courts to conduct *de novo* review of a trial court's application of [the *Gore* guideposts] to the jury's award.").

Section 4

Section 4(A) codifies the factors announced by the United States Supreme Court in *BMW of N. America v. Gore*, 517 U.S. 559 (1996) for determining the constitutionality of punitive damages awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury

and the civil penalties imposed in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (citing *Gore*, 517 U.S. at 575).

Section 4(B) explains, in accordance with United States Supreme Court jurisprudence, that punitive damages should be tied to the specific harm to the plaintiff. In determining the reprehensibility of the defendant's conduct, closely similar acts toward other persons may be considered. "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Campbell*, 123 S. Ct. at 1522. However, punitive awards are not to be based on a defendant's general misconduct, or on dissimilar acts toward other persons, or on acts outside the jurisdiction that are lawful where they occurred. Courts may not consider such evidence in analyzing the reprehensibility guidepost. The United States Supreme Court explained in *Campbell*: "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." 123 S. Ct. at 1524. Moreover, as the Supreme Court explained, "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *Id.* at 1523. In *Gore* and *Campbell*, the Supreme Court also emphasized that punitive damages cannot be used to punish extraterritorial conduct. In *Gore*, the court forbade punishment for

extraterritorial misconduct that was *lawful* in the state where it occurred. *See* 517 U.S. at 572. In *Campbell*, the Court further stated that, as a general rule, a State does not have "a legitimate concern in imposing punitive damages to punish a defendant for *unlawful acts* committed outside of the State's jurisdiction." 123 S.Ct. at 1522 (emphasis added).

Some courts already have applied the reprehensibility analysis set down by the Supreme Court. In *Diamond Woodworks, Inc. v. Argonaut Insurance Company*, 2003 WL 21361143 (Cal. App. June 13, 2003), the court ruled a $5.5 million punitive damages award to be unconstitutional. The action was brought by Diamond Woodworks, the client of an employee leasing company against the company and its workers' compensation insurer, Argonaut, to recover for breach of contract, bad faith, and fraud in connection with denial of benefits for a leased employee injured during the employee's first day of employment. Diamond Woodworks argued that Argonaut's reprehensibility should be measured by Argonaut's conduct toward the world at large, rather than as directed at Diamond alone. *Id.* at *18. Diamond argued that Argonaut lied to government agencies including the state's Workers' Compensation Insurance Bureau; it used unlicensed agents to write insurance in violation of state law; it denied other claims, in the same way it denied Diamond's; it treated all client companies as one insured under the policy; and it engaged in other conduct that was part and parcel of "'the exact transaction and circumstances of fraud perpetrated on the plaintiff.'" *Id.* The California court noted that while Diamond's conduct toward the plaintiff was reprehensible and justified an award of some punitive damages, the *Campbell* case made clear that conduct toward the world at large could not provide support for the punitive damages award. *Id.*

Section 4(C) explains to courts how to apply the United States Supreme Court's

"ratio" guidepost for the review of the due process implications of a punitive award, which was set forth in *Gore* and further interpreted in *Campbell*. The Supreme Court has declined to impose a "bright-line" ratio which a punitive damages award cannot exceed, although it has previously indicated that, in the usual case, a ratio of 3-to-1 or 4-to-1 will be the upper boundary, *see Haslip*, 499 U.S. at 23-24, and *Gore*, 517 U.S. at 581. The Supreme Court also has referred to traditional sanctions of double, treble and quadruple damages. *Id.*, *see also Campbell*, 123 S. Ct. at 1524. In *Campbell*, the Court explained that the principles established by its jurisprudence "demonstrate … that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*.

The outlier ratio of 9-to-1 set forth in Section 4(C)(1) is intended to provide maximum flexibility while reflecting the United States Supreme Court's concern that "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in ranges of 500 to 1, or, in this case, of 145 to 1." *Id*. The 15-to-1 ratio set forth in Section 4(C)(2) is included to address the unusual situation in which a small amount of compensatory damages may be awarded but egregiously reprehensive misconduct by the defendant merits a larger punitive award. *See Gore*, 517 U.S. at 582 (positing that a higher ratio than 4-to-1 *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). Courts should appreciate that the converse is also true. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. *Campbell*, 123 S. Ct. at 1524. This is

reflected in the Model Act's ratio of 1-to-1 in cases where compensatory damages are $10 million or greater.

Section 4(D) explains how to apply the third *Gore* factor, the "comparable civil penalties" guidepost. Lower courts have had particular difficulty applying this factor, possibly because it requires courts to go beyond the particular facts of the case in considering whether an award is excessive. Some courts have sought to apply legislative penalty schemes appropriate for wide-ranging misconduct, rather than the specific misconduct at issue in the case. Some courts have gone beyond legislative determinations regarding appropriate sanctions for the behavior in question, and compared the punitive damages award with jury verdicts in civil cases. Comparing a punitive damages award to other jury verdicts divorces this factor from its connection to the policy judgments of the legislature. Also, jury verdicts are retroactive judgments based on the specific facts in a case. As such, they are less appropriate for comparison than statutory penalties, which are intended to apply to a broad range of situations.

Because the "comparable civil penalties" guidepost more than any other embodies due process notice requirements, it is appropriate to limit consideration of "comparable penalties" to those civil penalties in effect at the time of the defendant's alleged misconduct. Both statutory and administrative civil penalties should be available for consideration, as administrative penalties may be the best source of comparable penalties, particularly where defendants are in regulated industries. The fact that a penalty theoretically could have been imposed for conduct is not sufficient; the only relevant penalties are those that actually have been imposed in practice for comparable conduct. *See Cooper Industries*, 532 U.S. at 442-43; *Campbell*, 123 S. Ct. at 1526; *Johansen v.*

Combustion Eng'g, Inc., 170 F.3d 1320 (3rd Cir. 1999). Furthermore, consideration of criminal penalties is inappropriate; "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Campbell*, 123 S. Ct. at 1526.

Section 5

This Section provides a severability clause.

Section 6

This Section provides a repealer clause.

Section 7

This Section provides that the provisions of the Act apply to all cases in which appellate review is pending on the date of enactment, as well as all future cases, regardless of when the circumstances giving rise to the claim occurred.